STATE OF MICHIGAN
IN THE SUPREME COURT
On Appeal from the Court of Appeals

RALPH ORMSBY and KIMBERLY ORMSBY,

Plaintiff-Appellee,

v.

CAPITAL WELDING, INC., an Ohio Corporation, and MONARCH BUILDING SERVICES, INC., an Ohio Corporation,

Defendants-Appellant.

Supreme Court Nos. 123287; 123289
Court of Appeals No. 233563
Oakland Circuit No. 98-008608-NO

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STATEMENT OF THE QUESTION INVOLVED

Are the "retained control doctrine" and the "common work area doctrine" separate and what is the scope of each doctrine?

- The Court of Appeals held that the doctrines are separate, but did not adequately define the scope of the "retained control doctrine."
- The parties did not specifically address these questions in their applications for leave to appeal.
- Amicus Michigan Chapter Associated General Contractors and Associated General Contractors, Greater Detroit Chapter ("AGC") contend that, as between the "common work area doctrine" and the "retained control doctrine," only the "common work area doctrine" provides a basis for imposing direct tort liability on a general contractor. The concept of "retained control" over an *independent* contractor is illogical. Retained control is relevant only to the question whether a master-servant relationship exists between the parties.

STATEMENT OF FACTS

AGC adopts the factual statements set forth in the applications for leave to appeal.

ARGUMENT

I. Introduction and Summary

This brief compliments (and should be read in conjunction with) the *amicus curiae* brief filed by the Michigan Manufacturer's Association ("MMA"). Where the MMA addresses the issue from the perspective of the owner, the AGC addresses the issue from the perspective of the general contractor.[1] For purposes of this legal issue, their interests are aligned. Like the MMA, the AGC relies on (1) the historical evolution of the "retained control" and "common work area" doctrines in Michigan, (2) the vague application of "retained control" liability by the Court of Appeals, and (3) the common sense notion that one cannot "retain control" over an *independent* contractor, for the proposition that "retained control" is not a separate basis for imposing tort liability upon one who hires an independent contractor, but rather a test for determining whether the relationship between the parties is one of master and servant. To the extent that a master-servant relationship exists, the liability (if any) owed by the *de facto* "master" to the *de facto* "servant" should be governed by worker's compensation law. To hold otherwise would undermine the comprehensive worker's compensation scheme enacted by the legislature.

Specifically, this brief addresses the scope of a general contractor's "retained control" liability to the employee of an "independent" subcontractor—one of the issues addressed in the Court of Appeals published opinion. This is a confused area of law sorely in need of Supreme Court guidance. Contrary to the vague and unrestricted holding of the published Court of Appeals opinion, AGC contends that a general contractor's so-called "retained control" liability

[1] For purposes of this brief, a "general contractor" is the highest level independent contractor on a job involving multiple levels of independent contractors.

is specifically limited to situations involving a common work area, where (1) a general contractor has supervisory and coordinating authority over the job site, (2) a common work area is shared by the employees of several subcontractors, (3) there is a readily observable, avoidable danger in that common work area, and (4) the danger creates a high risk to a significant number of workers. See *Hughes v PMG Building, Inc.*, 227 Mich 1, 6; 574 NW2d 691 (1997).

The seminal case establishing the tort liability of general contractors is *Funk v General Motors Corp*, 392 Mich 91; 220 NW2d 641 (1971). In *Funk*, *supra*, this Court determined that the general contractor employed by the owner to supervise and coordinate the subcontractors was subject to a new form of tort liability based on the unique responsibilities of a general contractor. Although *Funk* focused on the liability to which an owner could be subjected in the event of retention of control, the owner's retention of control subjected it to liability to the injured worker only because the owner, through its active exercise of control over the entire project, assumed the unique role and responsibilities owed by *the general contractor*. The liability of the general contractor was unrelated to the owner's retained control, and tied to its authority over common work areas. The general contractor's duty, as defined in *Funk*, exists *independently* from the master-servant relationship, *i.e.*, a general contractor's liability does not arise from the fact that it *employs* subcontractors, but rather, from the fact that it assumes the responsibility for coordinating and supervising the work of several subcontractors within a common work area. Provided that *Funk* itself is not overruled, general contractor liability should be limited to claims satisfying the four-part "common work area" test.

II. The current state of the law regarding general contractor liability is vague, confused, and lacks a coherent foundation.

As noted at pages 4-6 of MMA's brief, the current state of the law governing the liability of employers of independent contractors is vague, confused, and lacking a coherent foundation. To save space and time, ACG incorporates by reference MMA's argument on this point.

Of special note, however, is the problem posed by the juxtaposition of so-called "retained control" liability and the concept of an *independent* contractor. In general contracting, an independent subcontractor is engaged to undertake a specific part of a construction project, pursuant to its own choice of means and methods. It would be illogical to conclude that an independent subcontractor is independent, but also under the general contractor's control. Generally speaking, an "independent contractor" relationship is defined by the absence of "control." See *Kamalnath v Mercy Memorial Hosp Corp*, 194 Mich App 543, 553; 487 NW2d 499 (1992) (explaining that an independent contractor is defined as "one who, carrying on an independent business, contracts to do work without being subject to the right of control by the employer as to the method of work but only as to the result to be accomplished."); *Black's Law Dictionary* (7th ed.), p 774 (defining an independent contractor as "[o]ne who is hired to undertake a specific project but who is left free to do the assigned work and to chose the method for accomplishing it.)" 1 Restatement of Agency, 2d, § 2 (defining an independent contractor as "a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking"). In contrast, an "employee" is defined, in a general sense, as "[a] person who works in the service of another person (the employer) under an express or implied contract of hire, under which the employer has the right to control the details of the work performance." *Black's Law Dictionary* (7th ed.), p 543. If the *absence* of control as to means

and methods by the general contractor is the hallmark of independent contractor status, then the entire concept of "retained control" liability with respect to the employees of independent contractors rests on an inherently dubious foundation.

III. The scope of retained control liability is a subject of interest to general contractors.

The scope of retained control liability is of interest to the AGC because of the effect it may have on a new wave of suits brought by the employees of independent subcontractors. On a multi-employer worksite, independent subcontractors must bear responsibility for the means and methods they employ to complete their specific work and for the safety of their specific work-sites. Any expansion of general contractor liability on multi-employer work sites to cover injuries suffered by subcontractors' employees in areas dedicated or tendered to that subcontractor would unfairly increase the tort exposure of general contractors in situations where the general contractor should have no responsibility for insuring workplace safety. Simply put, the only time it makes sense to hold a general contractor directly liable in tort is when the injury occurs due to some failing by the general contractor in a matter within the general contractor's unique realm of responsibility (*i.e.,* within a "common work area" as specifically defined in *Funk*). If a subcontractor's employee is working for an independent contractor, outside of a "common work area," then ensuring that employee's safety should be the subcontractor's sole responsibility and any workplace injuries should be covered by worker's compensation. If the subcontractor is truly an *independent* contractor, then the general contractor—by definition—has not retained control over the manner or method of the work.

On the other hand, if the general contractor has, through its exercise of actual control over the manner or method of the work, created a *de facto* master-servant relationship with the employee, then any liability for the injury should be determined by application of the worker's

compensation laws, which exist as the sole remedy for injuries arising out of and in the course of the master-servant relationship. Under worker's compensation law, application of the "economic reality test" would be used determine which of the injured party's actual or *de facto* "masters" (*i.e.*, the subcontractor or the general contractor) is liable for the worker's compensation remedy. See, e.g., *Oxley v Dep't of Military Affairs*, 460 Mich 536, 550; 597 NW2d 89 (1999) (using the economic reality test to conclude that a national guard technician was an employee of the federal government rather than the state government for worker's compensation purposes).[2]

In addition to fairness considerations, limiting tort liability to common work areas would lend predictability to the scope of general contractor liability and would assist general contractors in conforming their conduct to the law's expectations. The four-part "common work area" test announced in *Funk, supra*, described in *Hughes, supra,* is clearly defined and, therefore, relatively easy for general contractors to adhere to. In contrast, the Court of Appeals explanation in *Ormsby* that a general contractor may be liable to a subcontractor's injured employee where it "retains less control than that of a master, but *enough* supervisory control" is vague to the extreme and, consequently, not at all helpful. See *Ormsby v Capital Welding, Inc*, slip op. p 5. What is "enough" control? The very vagueness of the test for liability under the so-called "retained control" theory evidences the doctrine's lack of a coherent foundation. In sum, the imposition of liability based on "control" over a supposed "independent" subcontractor undermines the entire concept of the "independent" subcontractor.

[2] Before adoption of the economic reality test, the control test was used to determine which of two putative "masters" would be liable for the injured worker's remedy under worker's compensation law. *Arnett v Hayes Wheel Co*, 201 Mich 67, 69-71; 166 NW 957 (1918).

IV. The historical underpinnings of the "retained control doctrine."

AGC agrees with, and expressly incorporates, the detailed historical analysis set forth in

73; 600 NW2d 348 (1999) (citing more recent cases). Thus, whether a hiring party has retained control over the worker has historically been relevant to the question whether an employment (*i.e.*, master-servant) relationship exists.

The focus on factual control (as opposed to whatever labels the parties place on their relationship) is based on the logical notion that substance should prevail over form. In other words, the mere existence of a contract should not make one an "independent contractor" where he or she is effectively treated as an employee/servant by virtue of the hiring party's retention of control. See *Samuelson*, *supra* at 174-175 (explaining that an owner would have been liable as a master to an injured miner if it had, in fact, worked the mine as a master, but not based solely on the contractual privilege to supervise the mining activities). Likewise, a project owner should be treated as a general contractor if it effectively becomes a *de facto* general contractor by assuming the general contractor's responsibilities with respect to a particular job. See *Funk*, *supra* at 108.

The point of this historical discussion is to show that "control" has traditionally been an indicator of the existence of a *master-servant relationship*. Liability for injuries arising from the master-servant relationship are governed by worker's compensation. Therefore, to the extent that a general contractor's control over the manner or method of the work eliminates the independent nature of a contractual relationship, and establishes a master-servant relationship in its place, the *de facto* master's liability (if any) should be determined according to worker's compensation law. While an injured worker may be able, in certain circumstances, to recover in tort from a third-party (in addition to whatever worker's compensation remedy is available), this sort of third-party tort recovery cannot be based on the existence of a master-servant relationship. For nearly one hundred years, common law tort duties arising from the master-servant relationship have been supplanted by worker's compensation. Therefore, third-party tort liability

necessarily must be based on some other independent duty.[3] Any imposition of tort liability based solely on the hiring party's retention of control over a *de facto* employee would be in conflict with Michigan's comprehensive worker's compensation scheme. (See MMA's *amicus curiae* brief, pp 16-17).

V. The Funk case established a new tort duty owed by general contractors (the "common work area doctrine") and found the owner liable for breach of the same duty based on the owner's retention of control over the project.

The leading case on the interplay between the "retained control doctrine" and the "common work area doctrine" is *Funk v General Motors*. The *Funk* case involved an owner (GM), an architect, a general contractor, a subcontractor, and an injured worker (Funk). Mr. Funk, an employee of the subcontractor, was injured when he fell while working on a new construction project at GM. After receiving worker's compensation from the subcontractor, Funk brought a third-party liability suit against both GM and the general contractor alleging that they owed him a duty to ensure that the workers on the project used adequate safety equipment to protect against falls. *Funk, supra* at 99-101. This Court affirmed a verdict against the general contractor on the ground that, in certain circumstances, a general contractor is responsible for the safety of its subcontractors' employees. *Id.* at 104. This Court also held that GM could be held liable because, through the supervision over the project by its architect, it "retained and exercised sufficient control so that it ought to be held responsible for its own negligence in failing to implement reasonable safety precautions by the general contractor and subcontractor." *Id.* at 108.

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[3] The "common work area" doctrine—which is not based on the master-servant relationship but instead on the general contractor's unique coordinating responsibilities—is an example of the sort of separate duty, independent of the master-servant relationship, that may support a tort recovery against a third party.

With respect to the plaintiff's claim against the general contractor, *Funk* established a new duty, applicable only to general contractors. While recognizing that the subcontractor was "immediately responsible for job safety," see *id.* at 102, Justice Levin, writing for the majority, reasoned as a matter of public policy that:

> [p]lacing ultimate responsibility on the general contractor for job safety in common work areas will, from a practical, economic standpoint, render it more likely that the various subcontractors being supervised by the general contractor will implement or that the general contractor will himself implement the necessary precautions and provide the necessary safety equipment in those areas. [*Id.* at 104.]

On this basis, Justice Levin concluded that "part of the business of a general contractor" was to "assure that reasonable steps within its supervisory and coordinating authority are taken to guard against readily observable, avoidable dangers in common work areas which create a high degree of risk to a significant number of workmen." The rule of general contractor liability first announced in *Funk* has since evolved into a specific four-part test: For a general contractor to be liable, there must be (1) a general contractor with supervisory and coordinating authority over the job site, (2) a common work area shared by the employees of several subcontractors, (3) a readily observable, avoidable danger in that work area, (4) that creates a high risk to a significant number of workers. See, e.g., *Hughes, supra* at 6.

After concluding that the general contractor could be held liable, Justice Levin also reasoned that the owner could be held liable, because it "assumed a dominant role" in the construction job and, therefore, could "properly be held responsible for the failure to implement adequate safety measures." *Id.* at 108. As support for the conclusion that GM exercised a dominant role in the project, the *Funk* Court noted that GM drew up the plans, wrote the contract specifications, hired several of the general contractor's subcontractors, wrote the subcontractor's contracts (which were later assigned to the general contractor), had an architect present at the

work site every day, conducted "on-the-spot" inspections of the work, and acting through its architect supervised certain aspects of accident prevention. *Id.* at 105-107. On the basis of this "exercise by General Motors of a retained control of the project," Justice Levin concluded that GM could properly be held liable, in much the same manner as the general contractor, "for the failure to observe safety precautions and provide safeguards."

An important observation about *Funk*—and one that has been overlooked by Court of Appeals opinions interpreting *Funk*—is that the "retained control" portion of the analysis was relevant *only* to the owner. The general contractor was liable because of its responsibility for coordinating the work of the various subcontractors within common work areas. See *Funk*, *supra* at 104. This had nothing to do with retained control. Retained control entered the equation *only* as the basis for finding *the owner* liable under the general contractor's "common work area" duty. See *Funk*, *supra* at 108. By retaining control over the general contractor's work, GM effectively stepped into the shoes of the general contractor and, as a *de facto* general contractor, assumed the unique tort duties that would otherwise have been owed only by the general contractor. Therefore, retained control, in and of itself, was not sufficient to impose liability on GM. GM was liable because of the common work area rule. *Funk* does not stand for the proposition that retained control, without more, can be the basis for tort liability. Therefore, courts may not properly rely on *Funk* for the proposition that a *general contractor* can be held liable based solely on a retained control theory. This case presents an excellent opportunity for this Court to clarify the limited holding of *Funk*, which provides that (1) a general contractor may be liable in tort when the requirements of the "common work area" doctrine are satisfied, and (2) an owner may be liable, *in the same manner as a general contractor*, where the owner retains actual control over the general contractor's work and responsibilities. In sum, AGC

contends that *Funk* should be limited to its facts. Where the owner's retention of control over the work of the *general contractor* effectively renders the owner a *de facto* general contractor, then the owner may be held liable for the specific duties of a general contractor according to the four-part "common work area doctrine."

As noted by MMA, since the time *Funk* was decided, this Court has had only two occasions to address the *Funk* rule, and neither case produced an opinion garnering votes from four or more justices. Notably, however, this Court's subsequent decisions are consistent with AGC's position that the "retained control" liability described in *Funk, supra*, is necessarily limited to the specific duties owed by a general contractor.

In *Plummer v Bechtel Construction Co*, 440 Mich 646; 489 NW2d 66 (1991), a worker was injured when he fell from an elevated platform. Relying on *Funk, supra*, he sued both the general contractor (Bechtel) and the owner (Edison) for failing to take reasonable precautions to protect his safety. In the lead opinion, Justice Levin (also the author of *Funk*) explained that Edison "exercised an unusually high degree of control over the construction project" including the authority to hire and terminate subcontractors. *Id.* at 559-661. Importantly, Justice Levin then went on to conclude as to *both* Bechtel and Edison—without distinguishing the liability of the owner from the liability of the general contractor—that the work site constituted a "common work area." *Id.* at 666. Apart from addressing the question whether Edison retained control over the project (an issue not relevant to the *actual* general contractor), the lead opinion treated Bechtel's and Edison's liability as being coextensive and dependent on the same factors, including the existence of a common work area. In her separate opinion, Justice Boyle agreed that there was a "common work area" without giving any indication that this would only be relevant to Bechtel. *Id.* at 670 n 1.

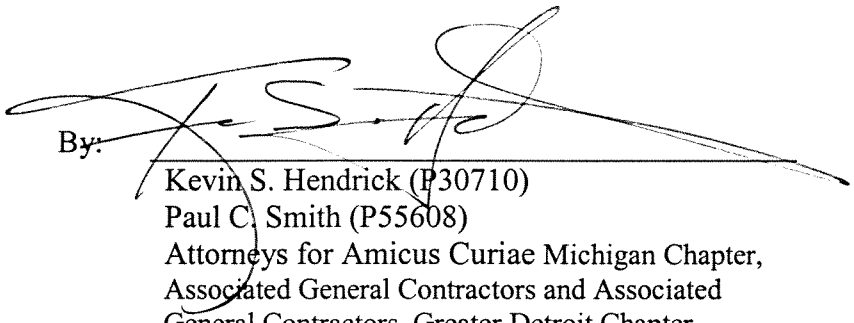
The other case to address the *Funk* rule was *Groncki v The Detroit Edison Company*, 453 Mich 644; 557 NW2d 289 (1996). In *Groncki*, the only defendant alleged to be liable under *Funk* was a general contractor, and no retained control claim was brought against the owner that hired the general contractor.

CONCLUSION

The "common work area doctrine" is a specific basis for imposing tort liability on general contractors. It arises from the general contractor's unique role with respect to safety in common work areas. Retained control is not relevant to application of the "common work area doctrine" unless the defendant is nominally an owner rather than a general contractor. In such a case, the owner's retained control over the general contractor's work may put the owner into the shoes of the general contractor, such that the owner too may be held liable under the "common work area doctrine." There is, however, no basis for imposing liability on a general contractor or an owner based solely on retained control over the injured employee's work. Where the retention of control merely serves to transform an independent contractor relationship into a master-servant relationship (which is the traditional role of the so-called "retained control doctrine"), the injured worker's proper remedy lies in the law of worker's compensation.

Respectfully submitted,

CLARK HILL PLC



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